

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26**

PACTIV, INC.

Employer

and

RAYMOND L. ADAMS

Case 26-RD-1050

Petitioner

and

**SOUTHWEST REGIONAL JOINT BOARD, UNION
OF NEEDLE TRADE INDUSTRIAL AND TEXTILE
EMPLOYEES (UNITE), AFL-CIO, CLC¹**

Union

DECISION AND DIRECTION OF ELECTION

Following the filing of a decertification petition under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. At the hearing, the sole issue litigated was the supervisory status of the warehouse coordinator, Anthony Reggans. The Employer contends that the warehouse coordinator is a supervisor under 2(11) of the Act, while the Union urges that he is not a supervisor. The Petitioner did not participate in the hearing.

I have considered the testimony and evidence presented at the hearing, and the briefs filed by the Union and the Employer. I have also taken administrative notice of the charge filed in Case 26-CA-20614-1 which alleges the Employer unlawfully changed the working conditions of the warehouse coordinator. As described below, I have decided that because of the pending

¹ The Union's name appears as amended at the hearing.

charge, the warehouse coordinator should vote pursuant to the Board's challenge ballot procedure.

FACTS

The Employer manufactures foam meat trays at its facility in Malvern, Arkansas. On September 26, 1997, the Union was certified as the exclusive collective-bargaining representative of a unit of the Employer's production, maintenance and warehouse employees. The Employer and Union are parties to a collective-bargaining agreement which is effective from December 14, 1998 to December 13, 2003. This agreement covers approximately 200 employees. Although the warehouse coordinator was not specifically included or excluded in the certified unit, the warehouse coordinator's wage rate is set forth in the collective-bargaining agreement.

The plant manager at the Malvern facility is Tom DeVito. Reporting to DeVito are Unit Manager Bernard Alexander, Melissa Faulk, in charge of environmental and safety, Linda Ball, who is over accounting, Bruce Deer, the Engineering Manager, and Jim Shantz, the Human Resources Manager.

Prior to January 21, 2002, Logistics Manager Ron Leeker, who was in charge of the warehouse as well as the production forklift operators, also reported to DeVito and Warehouse Coordinator Reggans reported to Logistics Manager Leeker. On January 21, 2002, Leeker was terminated as a cost saving measure. Since then, Warehouse Coordinator Reggans has reported to Unit Manager Alexander who assumed responsibility for the warehouse in addition to his responsibilities for production.

In the warehouse, all of the finished goods from production are stored, customer orders are filled and shipped, and raw material and end products from other plants are received. The

warehouse also handles any equipment received or sent by the Employer. The warehouse employees are responsible for the upkeep of their areas and the entire warehouse.

In addition to Warehouse Coordinator Reggans, nine full-time and five or six temporary employees² work in the warehouse. The full-time employees, classified as material handler specialists, drive the forklifts and load and unload the trucks. They also fill the orders, which involves the receipt of a sheet, picking the orders, staging them, loading the trucks and seeing that the orders are sent out. At the end of the day, the orders are posted to show what has been taken out of inventory, and invoices are sent to customers. The temporary employees can perform only certain jobs such as truck unloading or cleaning up. The temporary employees cannot stage or pick orders or drive forklifts. The temporary employees usually work with at least one full-time employee.

Although the production employees work in four shifts which operate 24 hours a day, seven days a week, the warehouse employees work from 7 a.m. to 3 p.m., Monday through Friday, plus overtime as needed to complete the orders on time. Each day three warehouse employees do staging work while other warehouse employees work in teams of three loading the trucks. The staging employees check the computer throughout the day for orders and determine how orders are loaded on to the trucks. The loading teams load and unload the trucks. Reggans assigns employees to the staging and loading teams based on a schedule developed by Kim Woods, the Logistics Manager before Leeker. In assigning employees for the teams, Reggans selects someone who was not on the staging team the previous day. Reggans assigns teams according to which employees worked together the previous day. If two employees worked together one day, generally those same employees would not work together the next day. During

² No party contends that the temporary employees should be included in the bargaining unit.

the day employees may swap jobs with each other. If a staging or loading team is temporarily short-handed, Reggans may assist them or have an employee who is within eyesight to temporarily switch positions.

With regard to training, when a new employee begins working in the warehouse, Reggans puts that employee with someone who has been in the shipping department the longest.

The full-time warehouse employees have worked in their positions for at least nine years and use their experience to determine which orders to complete first. Warehouse Coordinator Reggans has worked for the Employer for 21 years and has held the position of warehouse coordinator for about 16 years. Pursuant to the collective-bargaining agreement, the warehouse coordinator is paid \$3.12 per hour more than other warehouse employees. However, the warehouse coordinator is paid about \$1.70 an hour less than the productions supervisors.

The job description of the warehouse coordinator, dated November 9, 1998, reflects that the duties of the warehouse coordinator include: coordinating the duties of warehouse employees; ensuring the safe and correct loading of trucks; keeping the warehouse clean, ensuring all loads are shipped on the correct trucks; being responsible for all shipping and receiving in the warehouse and assuring that paperwork matches what is received or shipped; and handling all warehouse paperwork. Upon the departure of Leeker, the job description was not changed nor was Reggans told that his duties or responsibilities had changed.

The warehouse coordinator authorizes the warehouse employees to work overtime when necessary to load trucks with orders out that must be shipped. The number of employees who work overtime is determined by the number of trucks that need to be loaded. Which employees work the overtime is determined by the employees themselves who volunteer for overtime.

Regarding recommendations to hire, the record establishes that Reggans has made both oral and written recommendations to hire temporary employees as full-time employees of the Employer. In January 2002, Reggans for the first time completed written evaluations containing recommendations on hiring. Prior to January 2002, Reggans had orally recommended employees for hire. Human Resource Manager Shantz testified that Reggans orally recommended the Employer hire employees Vaden and Mitchell who were hired in late spring or early summer 2001. While Shantz testified that he did not independently investigate Reggans' recommendation to hire Vaden, the record is silent as to whether anyone else conducted an independent investigation and what role, if any, Logistics Manager Leeker, who was at that time responsible for the warehouse employees and spent almost all of his time in the warehouse, played in the decision to hire Vaden. The record also does not reflect if there was any independent investigation regarding the recommendation to hire Mitchell.

According to Reggans, the oral recommendations were followed approximately 50 percent of the time. Employees that Reggans recommended for hire who were not hired as full-time employees included Jamie Wright, Alvin Junior, and Bernard Smith. Human Resource Manager Shantz testified that they had intended to offer Wright a position based on Reggans' recommendation but due to an incident during which Wright became aggravated at Shantz's assistant and the receptionist, Wright was removed. Shantz explained that Junior was offered a position in production but Junior refused the position due to the shift offered. Junior then returned to the warehouse as a temporary and when he reached a certain number of days he was removed. Aside from Shantz's testimony that he did not recall Smith, the record is silent regarding why Reggans' recommendation to hire Smith was not followed.

On January 22, 2002, after the filing of the petition in this matter and two days after Leeker's departure, Human Resources Manager Shantz gave Reggans evaluation forms to complete for temporary employees who had worked 90 days. Although one form was included for an employee who had only worked a month, Shantz explained that form was mistakenly created. Reggans was instructed to state in the comment section of the form whether or not he recommended that person for hire. Reggans then evaluated the temporary employees working in the warehouse with these forms and in the comments section stated whether or not the temporary should be hired. All of the temporaries Reggans recommended for hire were offered positions with the Employer without an independent investigation by anyone.

On one of the evaluations, Reggans recommended that the individual be replaced. Based on this recommendation, Shantz contacted the temporary agency and requested that the individual be removed, effectively terminating the employee. There is no evidence that prior to January 2002, Reggans had ever recommended the termination of any employee.

I take administrative notice that on March 4, 2002, subsequent to the February 21 hearing in this matter, the Union filed a charge in Case 26-CA-20614-1 which alleges that about January 21, 2002, the Employer violated Section 8(a)(3) and (5) of the Act by changing the working conditions of Reggans without bargaining with the Union and in order to interfere with his union activity. Reggans served as the Union president from 1997 to January 2001 and at the time of the hearing, Reggans had been Union vice-president for approximately a month.

ANALYSIS

Supervisory status under the Act depends on whether an individual possesses the authority to act in the interest of the employer in the matters and in the manner specified in Section 2(11) of the Act, which defines the term "supervisor" as:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet this definition, a person needs to possess only one of the specific criteria listed, or the authority to effectively recommend such action, so long as the performance of that function is not routine but requires the use of independent judgment. See Ohio Power Co. v. NLRB, 176 F. 2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). See also Queen Mary, 317 NLRB 1303 (1995).

The burden of proving supervisory status rests with the party alleging that an employee is a supervisor. Williamette Industries, 336 NLRB No. 59 (2001) and Dynamic Science, Inc., 334 NLRB No. 57 (2001), citing NLRB v. Kentucky River Community Care, 532 U.S. 706, 167 LRRM 2164 (2001).

The Employer argues that the warehouse coordinator is a supervisor within the meaning of Section 2(11) of the Act and should be excluded from the unit because he assigns and schedules work to the full-time and temporary warehouse employees, transfers employees from one job to another, authorizes overtime for employees, and has effectively recommended employees for hire. The Employer also urges that a finding of Reggans’ supervisory status is supported by secondary indicia including Reggans having an office adjacent to the shipping office, signing time cards and the vacation book, making purchases on behalf of the Employer, and spending only an hour to an hour and a half each day performing manual labor. While it cannot stand alone, secondary indicia may support other evidence of supervisory status.

McClatchy Newspapers, 307 NLRB 773 (1992). Accordingly, I must first determine if there is evidence of supervisory status.

Assigning and scheduling work:

The warehouse employees have worked in their positions for at least nine years and use their experience to determine which orders to complete first. Reggans makes assignments based on a schedule prepared by a former logistics manager, taking into account which employees worked together the previous day. Making assignments on this basis does not establish the use of independent judgment. Since the record does not reflect that Reggans uses independent judgment in assigning tasks or scheduling work, a finding of supervisory status cannot be based on Reggans scheduling or assigning work to the warehouse employees.

Transfers:

The Employer asserts that Reggans transfers warehouse employees from one job to another to respond to issues such as last minute orders, changes to orders, and errors. The Employer attacks the plausibility of Reggans' claim that he selects whoever is in eyesight to transfer into a vacant position and urges that Reggans must exercise independent judgment in such instances. I am not persuaded that such transfer assignments establish supervisory authority. Given the significant experience level of the warehouse employees and the temporary nature of the transfers, the transfer decisions appear to be routine in nature and do not require the exercise of independent judgment.

Overtime:

Although Reggans authorizes overtime, his decision to do so is based on the amount of work remaining at the end of the normal work day. The number of employees needed is then determined based on the fact that three employees are needed for each truck. Reggans

authorization to give overtime is based on the Employer's requirement that all orders must be sent out to meet the customer's required delivery date. Thus, Reggans action in authorizing overtime to meet the customer's delivery requirements does not involve the exercise of discretion or independent judgment. Reggans does not select particular employees to work overtime as they volunteer. Accordingly, Reggans involvement in overtime matters does not warrant a finding of supervisory status.

Recommendations to Hire:

The record establishes that Reggans has made both oral and written recommendations to hire temporary employees as full-time employees. I find the evidence regarding the oral recommendations insufficient to establish that Reggans effectively recommended hiring employees without independent investigation. Regarding the hiring of Vaden and Mitchell, it is unclear whether there was any other input from Leeker or any other supervisor or any independent investigation regarding their hire. It is undisputed that Smith was not hired although recommended by Reggans. Although Junior was offered employment, Shantz testified only that they "intended" to hire Wright, and employment offer was never made. Accordingly, with regard to the evidence regarding Reggans' oral recommendations to hire, I find that the Employer has not met its burden to prove Reggans is a supervisor within the meaning of Section 2(11) of the Act. . Williamette Industries, 336 NLRB No. 59 (2001); Dynamic Science, Inc., 334 NLRB No. 57 (2001).

While I have determined that the evidence of Reggans oral recommendations to hire employees prior to January 2002 is not sufficient to establish supervisory status, Reggans evaluations and recommendations in January 2002 and the Employer's actions in response to those recommendations would appear to be sufficient to establish that Reggans effectively

recommends the hiring of employees. However, because the pending charge in Case 26-CA-20614-1 alleges that the Employer unlawfully changed Reggans' duties in January 2002, subsequent to the filing of the petition in this matter, I have determined that Reggans will be allowed to vote subject to challenge.

CONCLUSIONS AND FINDINGS

Based on the entire record in this proceeding, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Union is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.³

INCLUDED: All regular full-time employees including material handlers, thermoformer operators, extrusion operators, operator specialists, setup technician, process technicians, maintenance employees, maintenance utility

³ The description of the unit in which I am directing the election is the same as the unit certified in Case 26-RC-7931 except this unit has been modified to specify, consistent with the parties' stipulations, that backup team leaders are to be included in the unit and that the team leaders, unit manager, engineering manager and accounting manager should be excluded. While the unit description in the previous certification is not identical to the unit description in the collective-bargaining agreement, the agreement appears to cover the same employees as those in the certified unit. The petitioned-for unit is the same, with one apparent typographical error, as the certified unit. No party has contended there is any dispute regarding the petitioned-for unit other than with respect to the warehouse coordinator discussed above.

employees, material handler specialists (warehouse employees and forklift operators), purchasing agent, and backup team leaders employed by the Employer at its Malvern, Arkansas facility.

EXCLUDED: All other employees, including the plant manager, human resources manager, manufacturing and other fulfillment manager, shift supervisors, maintenance supervisors, technical manager, office manager, unit process engineer, environmental health and safety manager, production specialist, accounts payable and payroll employees, office clericals, temporary employees, confidential employees, guards, and supervisors, as defined in the Act, unit manager, engineering manager, accounting manager, and team leaders.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Southwest Regional Joint Board, Union of Needle Trade Industrial and Textile Employees (UNITE), AFL-CIO, CLC.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 26 within 7 days of the date of this Decision and Direction of Election. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. I shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, 1407 Union Avenue, Suite 800, Memphis, TN 38104, on or before March 22, 2002. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of **2** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.). If you have any questions, please contact the Regional Office.

NOTICE OF POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices to Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 10570. This request must be received by the Board in Washington by 5 p.m., EST, on March 29, 2002.

Dated at Memphis, Tennessee, this 15th day of March 2002.

/S/

Ronald K. Hooks, Regional Director
Region 26, National Labor Relations Board
1407 Union Avenue, Suite 800
Memphis, TN 38104-3627

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